United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

NO. 75-1180

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

RICHARD HUSS and JEFFREY SMILOW,

Appellants.

On Appeal from the United States District Court for
The Southern District of New York

BRIEF FOR APPELLANTS

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THE SOUTHERN DISTRICT OF NEW YORK

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Preliminary Statement

This is an appeal from the denial of a motion for a reduction of a one-year sentence of imprisonment. The order denying the motion was announced orally by Judge Thomas P. Griesa on April 1, 1975. The underlying judgments of conviction on which the appellants were sentenced were affirmed summarily by this Court on November 27, 1974. Nos. 74-2-47 and 74-2127. Earlier related decisions and cases pending before this Court are United States v. Huss, 482 F.2d 38 (1973);

Smilow v. United States, 465 F.2d 802 (1972), vacated and remanded, 409 U.S. 944 (1972), remanded, 472 F.2d 1193 (1973); and United States v. Huss and Smilow, No. 75-1192 (argued June 17, 1975).

QUESTIONS PRESENTED

1. Whether it was an abuse of discretion to impose a sentence in excess of six months upon students convicted of criminal contempt for refusal to testify in a criminal trial where no extraordinary circumstances compelling such a result exist, and where the refusal was based upon religious and moral grounds.

2. Whether in imposing sentence for criminal contempt for refusal to testify it is unlawful for the sentencing judge to impose a more severe sentence upon the defendants based upon the "nature of the prosecution which these defendants frustrated," thereby punishing the defendants because others allegedly committed serious offenses.

STATEMENT

Introduction

On July 16, 1974, appellants were convicted on charges of criminal contempt after a very brief jury trial. They were sentenced on July 31, 1974, to a one-year term of imprisonment. The convictions were summarily affirmed by this Court, Nos. 74-2047 and 74-2127, decided November 27, 1974, and this Court's mandate was thereafter issued on February 21, 1975.

On March 27, 1975, a motion for a reduction of sentence was filed, calling to the Court's attention, for the first time, the many decided federal cases involving criminal contempt sentence for refusal to testify. At a hearing on April 1 -- held during a lunch recess in a jury trial -- appellants' counsel argued that his research had found no case in which a one-year sentence for a refusal to testify had been sustained, and that in United States v. Levine, 288 F.2d 272 (2d Cir. 1961), this Court had reduced a contempt sentence in even more aggravated circumstances to six months. The prosecution argued, in response, that the Court should "focus . . . on the crime which formed the basis of the case at which these defendants were ordered to testify" (App. 379). He characterized the underlying trial as "an aggravated case" which required vindication of the court's authority by severe punishment. Judge Griesa announced that he was not sentencing the appellants for the underlying crimes, but that he was considering "the nature of the prosecution which was not prosecuted" (App. 382), and he denied the motion.

Past History

The history of this case is well known to this Court. Richard Huss and Jeffrey Smilow are young men who were believed by the prosecution to have evidence relevant to the bomb explosion that occurred on January 26, 1972, at the offices of Sol Hurok in New York City, at which time they were, respectively, 17 and 18 years old.

Neither of the appellants was charged as a conspirator or as a participant in the federal indictment which named four individuals as having committed that offense.

Huss and Smilow were, however, called as witnesses before the grand jury and in the federal trial growing out of the Hurok bombing after one of the defendants in that case (Sheldon Seigel) -- who the prosecution had once viewed as a cooperative informer -- refused to testify. Both Huss and Smilow refused to testify, even after a grant of immunity, on various grounds -- the one emphasized most often being that it would violate their religious principles to provide testimony. Both appellants were found to be in civil contempt by Judge Bauman, the trial judge in the Hurok bombing case, and were confined to jail during the pendency of their appeal from the contempt orders. Upon completion of the appeal and the resumption of the Hurok bombing trial, Huss and Smilow were again called to testify.

When both appellants again refused to testify -- at which time other substantial legal issues in addition to their religiously motivated claims were raised -- Judge Bauman signed orders to show cause which formally charged appellants with criminal contempt pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure.

ARGUMENT

INTRODUCTION

This case involves two young men whose lives have been substantially shattered, since well before their twentieth birthdays, by the legal consequences of a refusal to testify in federal criminal proceedings

involving the alleged commission of very serious offenses by others. The "others" were older and more experienced than these appellants and were, by any account, far more culpable under the law in every sense than the unfortunate individuals who are now before this Court. The appellants have, since the inception of the investigation, consistently maintained a religious and conscientious objection to testifying. To be sure, that objection was found legally insufficient by this Court, and we do not claim, here and now, that it was a defense to the criminal charge. But it is surely reason enough to wonder whether these appellants should be accorded the most severe criminal contempt sentence for refusal to testify that appears in the reported decisions of federal courts over the past two decades. Indeed, we believe that a review of the sentences issued in the several cases involving the Jewish Defense League and its members will disclose that these two individuals will, if the sentences against these appellants are permitted to stand, be subjected to heavier punishment than any other member of the organization -- including its leader and others who were directly inplicated in acts of violence or conduct preparatory to such acts. Ordinarily, of course, this Court has no authority to revise a sentence issued by a district court. But given the unusual nature of the power to punish for contempt and the fact that there is no statutory limit on the term of imprisonment that could be imposed, the Supreme Court has held that appellate courts have a duty to oversee the sentences

imposed in a criminal contempt proceeding. As noted by the Court in Green v. United States, 356 U.S. 165, 188 (1958):

> [W]here Congress has not seen fit to impose limitations on the sentencing power . . . appellate courts have . . . a special responsibility for determining that the power is not abused, to be exercised, if necessary, by revising themselves, the sentence imposed.

The straightforward standard upon which review has been based is whether there was an abuse of discretion. The Court said in Green that "[t]he 'discretion' to punish vested in the District Courts . . . is not an unbridled discretion." Id.

In applying the teaching of Green v. United States, this Court has required trial judges to examine in detail the reasons for commission of the contempt. Thus, in United States v. Levine 288 F.2d 272, 274 (2nd Cir. 1961), this Court reduced a one-year criminal contempt sentence to six months on the stated ground that "a year's sentence . . . would be justified only in case of deliberate violation unattended by mitigating circumstances."

We argue below that the trial judge abused his discretion in two respects: first, he failed to consider that there were "mitigating circumstances" within the meaning of the Levine decision; second, he erroneously considered the nature of the crime involved in the case in which appellants had refused to testify, thereby punishing them for the alleged offenses of others.

I

THE APPELLANTS' CONSCIENTIOUS GROUNDS OF REFUSAL, THEIR AGE AND THE ABSENCE OF ANY REHABILITATIVE PURPOSE CONSTITUTE "MITIGATING CIRCUMSTANCES" WHICH RENDER A SENTENCE IN EXCESS OF SIX MONTHS UNLAWFUL

When appellants Huss and Smilow were called to testify in the Hurok bombing trial they refused to testify on religious grounds. This Court has held, of course, that this basis for refusal to testify is not legally sufficient to foreclose a contempt citation. But neither this Court nor the district court has suggested that the underlying beliefs and motivations of the appellants was anything but bona fide.

We submit that appellants' fears of religious and moral violations are at least as much "mitigating circumstances" as the fears of violent reprisal relied upon in United States v. Levine, 288 F.2d 272 (1961), in which this Court reduced a one-year sentence to six months. In the Levine case, this Court cited with approval the listing of criminal contempt sentences in the late Chief Justice Warren's dissenting opinion in Brown v. United States, 359 U.S. 41, 58 n. 11 (1959). In that enumeration, the refusals to testify "during the course of trial" (viewed as most severe by the late Chief Justice) were punished with sentences of 8 months (and a $750 fine); 90 days and a $1,000 fine; 6 months; and 30 days. The opinion observed that the only sentence as extreme as one year had been reversed. Ibid.

Appellate courts have, since Brown, subjected contempt sentences to a "mitigating circumstances" test in tempering the otherwise unlimited power of the trial courts. See, e.g., United States v. Bukowski, 435 F.2d 1094, 1110 (7th Cir. 1970), cert. denied, 401 U.S. 911 (1971); In re Van Meter, 413 F.2d 536, 538-39 (8th Cir. 1969); United States ex rel. Robson v. Malone, 412 F.2d 848, 850-51 (7th Cir. 1969); United States v. Conole, 365 F.2d 306, 308 (3d Cir. 1966), cert. denied, 385 U.S. 1025 (1967).

Beyond the mitigating nature of appellants' religious and moral beliefs, there are additional factors which merit consideration as matters in mitigation. In reversing and remanding a criminal contempt sentence of six months for violating a court injunction prohibiting appellant from engaging in business as a livestock dealer without complying with certain specified requirements, the court noted in In re Van Meter, 413 F.2d 536, 538 (8th Cir. 1969):

> There are several alleviating circumstances which impel us to conclude that the sentence imposed is disproportionate to the offense committed. Appellant has no prior criminal record; his conduct was not shockingly contemptuous . . .

This case relates to two young men who have not, apart from their dedication to the well-being and survival of their people, been involved in any criminal violations. They plainly have no personal gain or profit from the kind of activity which the record reflects, and their actions may have been misguided and wrong, but they were plainly not the "shockingly contemptuous" kind that calls for rehabilitation. Indeed, at the appellants' original sentencing, Judge Griesa noted that his purpose in sentencing them

Second, in United Mine Workers the "consequences of the contumacious behavior" were direct, severe and crippling to the entire nation. Here, the necessary consequences of appellants' refusals to testify are speculative. Would there have been a successful conviction of the named defendants? How would such a conviction have affected others? In fact, the principal informer for the government -- whose testimony would have been most effective -- had already refused to testify, and his refusal was ultimately upheld by this Court. And it appears from this Court's earlier decision that if these appellants had properly presented an unlawful surveillance claim, they too might have avoided a lawful order to testify.

Third, in United Mine Workers the "public interest" was the continuation of bituminous coal production. Absent some harsh sanction there would be no real "deter[rence to] such acts in the future." Thus, there was a legitimate need to impose harsh sanctions as a means of coercion, as well as punishment, so as to guarantee full production of the nation's coal needs. Here, the only purpose of a sentence today is punitive. Appellants had already spent approximately nine weeks in prison for coercive purposes.

The propriety of a six-month maximum sentence is further demonstrated by the Supreme Court's recent decision in United States v. Wilson, No. 73-1162, 43 U.S. Law Week 4584 (decided May 19, 1975). In that case the Court approved of a procedure under which a district court tried and sentenced two witnesses who had refused to testify in two armed robbery cases under the summary procedures provided by Rule 42(a) of the Federal Rules of Criminal Procedure. Each of the witnesses

was an indicted accomplice of the principal defendant in one of the robberies, yet the sentence imposed for the contemptuous refusal to testify was only six months.

The Wilson case is instructive not merely for the actual sentences handed out to the contemnors. Since a sentence in excess of six months cannot constitutionally be imposed without a jury trial (Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966)) it is plain that no summary procedure under Rule 42(a) could be used if a sentence in excess of six months were appropriate. Yet the Court not only permitted Rule 42(a) to be used but viewed it as a most suitable means of dealing with a witness who refuses to testify in the course of a trial. 43 U.S. Law Week at 4586. If the Supreme Court had believed that a sentence in excess of six months were suitable, it would not so readily have encouraged the use of summary procedures.

As reflected in the comprehensive survey of cases on the subject of sentencing in cases of criminal contempt by the late Chief Justice Warren in his dissent in Brown v. United States, 359 U.S. 41, 58 n. 11 and 12 (1959), a sentence in excess of six months is most unusual. Other than consideration of the heinous nature of the underlying crime for which appellants were ordered to testify -- an improper consideration as discussed more fully below -- there was no reason to find appellants' contempts any more severe than any of the contempts in the thirty-four cases cited by Chief Justice Warren. Accordingly, Judge Griesa abused his discretion in sentencing the appellants to imprisonment for more than six months.

II

THE JUDGE WAS NOT PERMITTED TO CONSIDER UNPROVEN CHARGES AGAINST OTHER DEFENDANTS IN SENTENCING THE APPELLANTS

The purpose of a criminal contempt proceeding is "the vindication of the court's dignity and authority," Harris v. United States, 382 U.S. 162, 164 (1965), and "the punishment imposed should bear some reasonable relation to the nature and gravity of the contumacious conduct," United States v. Conole, 365 F.2d 306, 308 (3d Cir. 1966). In furthering this purpose, considerations relevant to sentencing should be limited to the act of contempt itself for which an individual stands convicted. In the case at bar, however, the trial judge not only considered the underlying crimes involved in the Hurok bombing case, but he also specifically characterized the appellants as actors in the heinous crime itself. We submit that such characterizations and considerations are clear error and sentences emanating from such characterizations require correction by this Court.

On July 31, 1974, appellants were sentenced by Judge Griesa to one year's imprisonment following their conviction for criminal contempt. An appeal from the underlying conviction was taken to this Court and the judgment was summarily affirmed on November 27, 1974. On March 6, 1975, prior to appellants' scheduled date of surrender, a hearing was held before Judge Griesa during which time a request was made that appellants be provided with kosher food during their period of incarceration. In the course of commenting on the kosher food request, Judge Griesa made the following statements which reflected his attitude towards the appellants (App. 405;

emphasis added):

> But I must say that I can't help but observe that there is a tremendous effort to take care of the dietary problems of these two men and it is a little bit ironic in view of the crimes which they participated in.
>
> They are all [the Bureau of Prisons] supposed to take great care about the dietary laws, but some woman was killed as a result of the activities of these two young men.

Evidently, in the view of Judge Griesa, the fact that appellants refused to testify with regard to the crime made them actors in, and therefore culpable for, that crime. The nature of this fundamental error need not be expounded. Suffice it to note that appellants were convicted for refusing to testify and not for the bombing of the Sol Hurok offices.

At a subsequent hearing, on April 1, 1975, during which limited argument on the motion for reduction of sentence was heard, counsel for appellants, at the very outset of his presentation, referred to Judge Griesa's statement of March 6, 1975, and pointed to the error in that pronouncement. (App. 370-372). Following the government's presentation on this issue, Judge Griesa attempted to clarify his position, and stated his reasons for imposing the one-year sentence and for denying the motion for a reduction of sentence (App. 380-382). While the judge apparently retracted his earlier characterization that appellants were responsible for the Hurok bombing and the resulting death, he stated that

> the Court must consider the nature of the prosecution which these defendants frustrated and prevented or helped to prevent, and that prosecution was of a very serious nature. It should have gone forward for the protection of society and for the enforcement of the law, and the prevention of that prosecution is a most serious matter and deserves a one-year sentence, to say the least.

We submit that this too was an improper characterization of the crime for which appellants were convicted, and an improper motivation for the imposition of sentence. Whether appellants' refusals to testify frustrated a prosecution "of a very serious nature" depends on the proof at the underlying trial. To punish appellants because the prosecution has charged a serious crime against others is, at best, to have them suffer for someone else's wrongdoing -- and, at worst, to impose punishment on them on bare conjecture that their associates were involved in criminal activity.

Certainly the bombing which resulted in the death of an innocent individual was an inexcusable act. The prosecution's inability to proceed with a prosecution is unfortunate. But that does not change the nature of the appellants' own conduct, which has to be judged in light of what was alleged and proved in their case, not what was charged in a different proceeding.

CONCLUSION

For the foregoing reasons, the order denying appellants' motion for reduction of sentence should be reversed and their sentences reduced to six months' imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 1975, I caused two copies of the Brief for Appellants to be mailed, first class mail, postage prepaid, to Robert Gold, Esquire, Assistant United States Attorney, United States Courthouse, Southern District of New York, New York, New York 10007.

Nathan Lewin